

# In the Court of Appeals of the State of Alaska

**Jeremy Bienek,**

Appellant,

v.

**State of Alaska,**

Appellee.

Court of Appeals No. **A-11994**

## **Order**

Date of Order: **February 18, 2020**

Trial Court Case No. **3AN-11-09541CR**

Before: Allard, Chief Judge, and Wollenberg, Judge, and  
Mannheimer, Senior Court of Appeals Judge\*

Jeremy Bienek was charged with attempting to sexually assault eighteen-year-old C.D. Prior to trial, the trial court conducted an *in camera* review of C.D.’s juvenile and Office of Children’s Services (OCS) records and disclosed thirteen pages to the parties. The court withheld the remaining records, finding that they were “not relevant to the instant case nor likely to lead to the discovery of admissible evidence.”

Bienek was convicted following a jury trial. He now appeals.

On appeal, Bienek argues that the trial court erred in refusing to disclose more of C.D.’s juvenile and OCS records, and he asks us to review the sealed records. We have independently reviewed the undisclosed records and compared them to the thirteen pages that the trial court disclosed to the parties.

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\* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

Based on our review, we have identified portions of three documents that are pertinent and should not have been withheld as “not relevant.” We are therefore disclosing this information to current counsel for the parties.

It is appropriate that the parties be given an opportunity to address the significance of this additional information and whether the trial court’s failure to disclose it was prejudicial to Bienek. We also note that we have identified two potential theories of waiver, which we ask the parties to address in their memoranda.

Accordingly, it is ORDERED:

1. The Clerk’s Office shall distribute to current appellate counsel for Bienek and the State the documents designated for distribution by this Court. The Clerk’s Office shall maintain these documents under seal pursuant to Administrative Rule 37.5(c)(5) and in a separate envelope clearly designated with the date of distribution to the attorneys. These documents shall be used only in relation to this case and shall remain in the exclusive possession of the attorneys. Neither the Clerk’s Office nor counsel for Bienek may provide a copy of the documents to Bienek directly, but Bienek’s attorney may discuss the content of the documents with Bienek.

2. On or before **March 19, 2020**, Bienek shall file a memorandum addressing the additional records. This memorandum need not conform to Appellate Rule 212, and it shall be no longer than 10 pages.

In addition to addressing the content of the newly disclosed documents, Bienek’s attorney should also address whether Bienek’s trial attorney waived the right to complain of the trial court’s failure to disclose these documents. Here are the two

potential theories of waiver revealed by the record:

(a) When the trial court disclosed limited portions of C.D.’s juvenile and OCS records, it withdrew an earlier order requiring disclosure of C.D.’s mental health providers. The trial court issued this withdrawal without prejudice for Bienek’s new attorney to renew the request after reviewing this Court’s then-recent decision in *N.G. v. Superior Court*.<sup>1</sup> Even though Bienek’s attorney was aware of C.D.’s mental health history from the documents he did receive, the record shows that he did not renew his request for C.D.’s mental health records.

(b) Based on the information Bienek’s trial attorney knew regarding C.D.’s mental health, the attorney filed a motion to introduce evidence of C.D.’s mental health diagnoses and medication history at trial. The trial court denied this motion, and Bienek does not challenge the trial court’s ruling on appeal.

3. After Bienek files his supplemental memorandum, the State shall have 30 days to file a responsive memorandum. Again, this memorandum need not conform to the requirements of Appellate Rule 212, and it shall be no longer than 10 pages.

4. Within 20 days after the State files its supplemental memorandum, Bienek may file a reply memorandum of no more than 5 pages.

5. After this Court receives the parties’ supplemental memoranda, we will resume our consideration of this case.

Entered at the direction of the Court.

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<sup>1</sup> *N.G. v. Superior Court*, 291 P.3d 328 (Alaska App. 2012).

*Bienek v. State of Alaska* – p. 4  
File No. A-11994  
February 19, 2020

Clerk of the Appellate Courts

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